

Message Text

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ACTION EUR-25

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C O N F I D E N T I A L USNATO 0219

E.O. 11652: GDS DEC 79

TAGS: ECON EFIN MCAP NATO

SUBJECT: NADGE-CONTRACTOR'S REQUEST FOR EQUITABLE ADJUSTMENT

STATE FOR EUR/RPM

DEF FOR OASD I&L AND ISA

REF: A. STATE 008866

B. USNATO 5761

SUMMARY: PER REF B, MISSION RECOMMENDS ACCEPTANCE OF WORKING GROUP RECOMMENDATION ON APPROACH TO AND RANGE OF SETTLEMENT OFFER. ALTERNATIVE I&L RECOMMENDATIONS APPEARS NO MORE JUSTIFIABLE THAN WOULD SIMILAR SUGGESTION FOR ANY OTHER INFRASTRUCTURE PROJECT. END SUMMARY.

1. WE SEE CONSIDERATIONS ON SETTLEMENT OF NADGE CLAIM AS FOLLOWS:

A. LEGAL BASIS: THE WORKING GROUP REPORT AND NPB BRIEFING FIND SUFFICIENT LEGAL BASIS IN CONTRACTOR'S REQUEST FOR EQUITABLE PAYMENT ADJUSTMENT TO JUSTIFY PAYMENT OF A PORTION OF THE REQUESTED IAU 14 MILLION. THE GROUP CONCLUDED THAT SUBMISSION OF A FORMAL CLAIM BY THE CONTRACTOR TO ARBITRATION OR LITIGATION WOULD RESULT IN PAYMENT OF AT LEAST AS MUCH PLUS CONSIDERABLE
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LEGAL EXPENSE BY NATO. IF WASHINGTON AGREES WITH THAT CONCLUSION, WE SEE THE U.S., AS A PARTY TO THE MAIN CONTRACT, OBLIGATED TO PAY ITS 30.85 PERCENT SHARE OF THE SETTLEMENT.

B. U.S.-IMPOSED CEILING TO NADGE COSTS: THERE MAY BE SOME THOUGHT IN OSD OF HOLDING TO THE IAU 110 MILLION CEILING IMPOSED IN 1965 BY SECRETARY MCNAMARA. PRESUMABLY THE COROLLARY OF A CEILING ON U.S. CONTRIBUTION AT \$95 MILLION HAS BEEN CANCELLED BY THE FLUCTUATIONS OF CURRENCY EXCHANGE RATES FOR WHICH OUR ALLIES CANNOT BE HELD RESPONSIBLE. ORIGINAL CEILING WAS IMPOSED BECAUSE U.S. EXPERTS DID NOT BELIEVE THAT A WORKABLE SYSTEM COULD BE PRODUCED FOR IAU 110 MILLION AND, FACED WITH REFUSAL BY ALLIES TO PRE-ENGINEER THE SYSTEM BEFORE CONTRACT AWARD, U.S. EXPERTS WANTED TO AVOID ANY OPEN-ENDED COMMITMENT WHICH COULD HAVE RESULTED IN MAJOR COST OVER-RUN TO ACHIEVE OPERATIONAL NADGE SYSTEM. USNATO HAS BEEN ADAMANT IN REQUIRING RESPECT OF THE CEILING AND NADGE IS NOW A REALITY AT A FINAL COMMITMENT (BEFORE THE CLAIM) OF ABOUT IAU 108 MILLION. THUS, THERE REMAINS SOME IAU 2 MILLION UNDER THE CEILING TO APPLY AGAINST THE CLAIM. THE ADDITIONAL AMOUNT OF 3 TO 6 MILLION REQUIRED FOR THE RANGE OF SETTLEMENT SUGGESTED BY THE WORKING GROUP APPEARS TO BE EXTREMELY MODEST IN RETURN FOR A QUIT-CLAIM FROM THE CONTRACTOR ON A SYSTEM WHICH IS SUCCESSFUL BEYOND THE WILDEST HOPES OF ITS BUYER. THIS IS PARTICULARLY TRUE WHEN COMPARED TO U.S. EXPERIENCE IN COMPARABLE SYSTEMS.

IN ADDITION TO THE ABOVE CONSIDERATIONS, THE NADGE CONTRACT REQUIRES THAT EACH NATION RECEIVE ITS CONTRIBUTIONS BACK IN PAYMENTS TO ITS NATIONAL CONTRACTORS. THUS, IF THE U.S. SHOULD REFUSE TO CONTRIBUTE TO ANY PAYMENT ABOVE THE IAU 110 MILLION CEILING, THE ADDITIONAL PAYMENT AGREED BY THE ALLIES WOULD PRESUMABLY BE DIVIDED AMONG THE 5 EUROPEAN PARTNERS OF THE CONSORTIUM TO THE DETRIMENT OF THE U.S. PARTNER.

2. WE DOUBT THE ADVISABILITY OF ANY SUGGESTION THAT NADGE CLAIM BE TREATED AS A BURDENSARING ITEM. AT PRESENT FRANCE (12 PERCENT NADGE SHARE) IS NOT INVOLVED IN BURDENSARING AND THE FRG AND U.K. ARE DECLINING TO SHARE THEREIN. WE BELIEVE THAT ANY INDICATION TO THE CONTRACTOR THAT SETTLEMENT WAS THAT TENUOUS WOULD LEAD TO IMMEDIATE ARBITRATION OR LITIGATION
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AND, EVENTUALLY, AN AWARD TO CONTRACTOR WOULD RUN INTO THE SAME DIFFICULTIES OUTLINED IN PARA. 1.A. ABOVE. NOR CAN WE RATIONALIZE LOADING THIS ONE-TIME \$3-\$6 MILLION U.S. CONTRIBUTION INTO POSSIBLE ANNUAL SAVINGS IN INFRASTRUCTURE BURDENSARING OF AS MUCH AS \$65 MILLION.

3. WERE WE TO CONSIDER NOT PARTICIPATING IN CERTAIN INFRASTRUCTURE PROJECTS, WE COULD CERTAINLY FIND ONE WITH A HIGHER PAYOFF (E.G.: NICS, FOLLOW-ON NADGE, ETC.). AN EQUALLY UNPALATABLE MANNER IN WHICH THE U.S. COULD ESCAPE CONTRIBUTING TO ANY EVENTUAL NADGE SETTLEMENT WOULD BE TO CHARGE IT TO A NEW EDIP; BUT WE HAVE NO ASSUREANCE THAT THERE WILL BE SUCH A PROGRAM (TO WHICH, IN ANY CASE, THE FRENCH DON'T CONTRIBUTE). IT SHOULD ALSO BE NOTED THAT THE

INFRASTRUCTURE COMMITTEE HAS EXAMINED THE CASE OF A POSSIBLE NADGE SETTLEMENT AND RULED THAT IT WOULD HAVE TO BE CONSIDERED AS A COST OVER-RUN CHARGEABLE AGAINST THE ORIGINAL PROJECT IN SLICES XII-XV AND PAYABLE FROM FUNDS STILL AVAILABLE IN THAT GROUP OF SLICES.

4. RECOMMEND, THEREFORE, DROPPING THE ALTERNATIVE THAT EUROPEANS ASSUME RESPONSIBILITY FOR NADGE CLAIM FROM THE REQUEST FOR SECDEF DECISION. U.S. AGREEMENT TO CONTRIBUTE TO THE NADGE SETTLEMENT (FROM FUNDS ALREADY COMMITTED TO NATO) SHOULD BE SOUGHT ON ITS OWN MERITS. U.S. DECISION IN THIS MATTER IS SIMPLY TO PARTICIPATE AS RECOMMENDED OR NOT TO PARTICIPATE. IN THE LATTER CASE, FURTHER DECISION AS TO SOLUTION OF NATO/CONTRACTOR PROBLEM WOULD BE BY OUR ALLIES.
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